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SYNOPSYS, INC.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

SYNOPSYS, INC.,
Plaintiff,
v.
U.S. DEPARTMENT OF LABOR,
Defendant.

Case No. 4:20-cv-00693-KAW

**SYNOPSYS, INC.'S OPPOSITION TO
CROSS-MOTION FOR SUMMARY
JUDGMENT; REPLY IN SUPPORT
OF MOTION FOR SUMMARY
JUDGMENT**

Date: May 7, 2020
Time: 1:30 pm
Dept: TBD
Judge: Hon. Kandace A. Westmore

1 **I. INTRODUCTION**

2 The government opposes summary judgment in this Reverse-FOIA Action without
 3 disputing the core merits issues: that the sought-after Synopsys EEO-1 information falls within
 4 the protective scope of both FOIA Exemption 4 and 18 U.S.C. § 1905. Instead, the government
 5 attempts to impede Synopsys' claims by raising a variety of procedural objections that, if
 6 accepted, would only create unnecessary complexity and gross unfairness to Synopsys. Indeed,
 7 the government is already trying to leverage the procedural posture of this dispute to assert
 8 inconsistent arguments that set Synopsys up for a Catch-22 in which there is nothing Synopsys
 9 can do to protect its rights. *Compare CIR* Dkt. No. 65, at 13-14 (emphasis in original) (citations
 10 omitted) ("Even if the disposition of this lawsuit might affect Synopsys's interests, it might not
 11 *impair* those interests if Synopsys has other means to protect them. Here, Synopsys has filed a
 12 separate lawsuit setting forth the exact claim that it seeks to insert into this litigation. ... In these
 13 circumstances, intervention is not necessary ..."), *with Synopsys* Dkt. No. 24, at 13 (arguing that
 14 "Synopsys should not be permitted to use this action ... effectively to reopen proceedings").¹

15 The government attempts to use this Court's disclosure order as both a sword and a shield,
 16 arguing in the original FOIA Action that Synopsys cannot intervene because the government has
 17 unfettered, unreviewable discretion, while simultaneously arguing here in the Reverse-FOIA
 18 Action that the government has no discretion—and is simply executing a judicial order. The
 19 Court should reject this "heads I win, tails you lose" logic and grant summary judgment in
 20 Synopsys' favor.

21 **II. ARGUMENT**

22 **A. The Government Does Not Dispute The Underlying Merits Of Synopsys'**
 23 **Claim**

24 The government's opposition to Synopsys' summary-judgment motion focuses entirely
 25 on whether Synopsys can litigate its reverse-FOIA claim in this posture. The government does
 26 not dispute—and therefore "concede[s] ... as a matter of law"—the central merits of Synopsys'

27 ¹ Citations designated "*CIR* Dkt. No." refer to the docket entries in the FOIA Action, Case
 28 No. 4:19-cv-01843-KAW. Those designated "*Synopsys* Dkt. No." refer to the docket entries in
 this Reverse-FOIA Action, Case No. 4:20-cv-00693-KAW.

reverse-FOIA claim. *Newton v. Am. Debt Servs., Inc.*, 75 F. Supp. 3d 1048, 1063 (N.D. Cal. 2014) (failure to address an argument at summary judgment constitutes a “conce[ssion]” of that issue “as a matter of law”); *see also Tuan Anh Le v. Bank of N.Y. Mellon*, 152 F. Supp. 3d 1200, 1210 (N.D. Cal. 2015). In particular, the government does not dispute that the Synopsys information at issue in this litigation is (1) confidential commercial information subject to FOIA Exemption 4, 5 U.S.C. § 552(b)(4), and (2) barred from disclosure under 18 U.S.C. § 1905 as both confidential statistical data and trade secrets.² Thus, in opposing the summary judgment motion here (and seeking judgment in its favor), the government asks this Court to condone the disclosure of records which the government itself acknowledges are protected by both statutes, without affording Synopsys the chance to be heard on the merits.

B. The Disclosure Order Does Not Shield The Government’s Action From APA Review

The government argues that the Court’s disclosure order in the original FOIA Action shields it from this Reverse-FOIA Action. As an initial matter, the Court’s December 2019 disclosure order has been stayed. Indeed, the only operative order on the issue is this Court’s February 2020 order that “prevents the disclosure of the EEO-1 Consolidated Reports.” *CIR* Dkt. No. 52, at 3. Thus, the government cannot argue that it is immunized from this challenge because it is compelled by the Court’s order to disclose the information.

The government cites *GTE Sylvania, Inc. v. Consumers Union of the United States*, 445 U.S. 375 (1980), to suggest that no APA review can be conducted in light of this Court’s disclosure order. But, as noted, that order has been stayed. Moreover, the government has *GTE Sylvania* exactly backwards. In that case, the reverse-FOIA claim was decided first, and the district court enjoined the government from disclosing the records in question. *Id.* at 377-78. In a subsequent case brought by the FOIA requestors, the Supreme Court rejected a regular FOIA claim seeking the records, because in light of the preexisting injunction against disclosure, the records were not “improperly withheld” within the meaning of FOIA. *Id.* at 386-87. The present

² The government questions whether these two provisions remain coextensive after the Supreme Court’s decision in *FMI*. *Synopsys* Dkt. No. 24, at 11 n.2. It makes no argument to that effect, however, and it concedes that the Synopsys information is subject to both provisions regardless of their overlap.

litigation has followed the opposite course, and *GTE* therefore does not apply. *Weisberg v. U.S. Dep't of Justice*, 631 F.2d 824, 830 n.39 (D.C. Cir. 1980) (“Unlike *GTE*, the instant case presents the possibility of an initial disclosure order under FOIA, followed by a later suit brought under a separate statute such as the Copyright Act to reverse or remedy that initial order.”). As a result, this Court can and should reach the merits of Synopsys’ reverse-FOIA claim. *See id.* at 828-31.

Moreover, the disclosure order in the FOIA Action is not only stayed, this Court is maintaining that stay while the Court considers the intervention motion that would allow the reverse-FOIA claims to be heard as part of that action. Thus, that pending FOIA Action, which may soon also involve these very reverse-FOIA claims, cannot be used as a mechanism for preventing those claims from being heard by this Court (either in that action or through this one).

C. Synopsys States A Cognizable Reverse-FOIA Claim

Citing *Chrysler Corp. v. Brown*, the government argues that Synopsys fails to state a valid reverse-FOIA claim. But Synopsys has followed *Chrysler* step-by-step. The key holding in *Chrysler* was that 18 U.S.C. § 1905 provides no “private right of action to enjoin disclosure in violation of the statute.” 441 U.S. 281, 316 (1979). But *Chrysler* immediately prescribed an alternative, proper approach: an agency’s “decision to disclose the ... reports is reviewable agency action” under the APA. *Id.* at 318. In *Chrysler*, the Supreme Court directed the court of appeals to consider on remand whether disclosure of the EEO-1 data at issue there was “not in accordance with law,” namely, 18 U.S.C. § 1905—the very statute we rely upon in this Action. *Id.* at 318-19.

And the filing of this action follows the playbook affirmed by the Government last year in the Supreme Court. In *Food Marketing Institute v. Argus Leader Media*, the government told the Supreme Court: After *Chrysler*, “[t]he only proper course for a person opposing an agency’s disclosure of records is to assert a so-called ‘reverse’-FOIA claim invoking the legal protection of a *different* statute creating a cause of action to set aside an agency decision to disclose records. That person, for instance, may sue under the APA to challenge agency action to disclose records on the ground that disclosure would be contrary to some other non-FOIA source of law.” Brief

1 for the United States as Amicus Curiae at 33-34, *Food Mktg. Inst. v. Argus Leader Media*, 139 S.
 2 Ct. 2356 (2019) (No. 18-481), 2019 WL 929184, at *33-34.

3 In this case, Synopsys has done just that: asserting a reverse-FOIA claim under the APA
 4 premised on two independent legal theories. First, Synopsys contends that disclosure of the
 5 records under FOIA would be arbitrary, capricious, and contrary to law where the government
 6 itself believes the records to be protected by Exemption 4. That unexplained inconsistency is
 7 classic agency caprice. *E.g.*, *Alphonsus v. Holder*, 705 F.3d 1031, 1046 (9th Cir. 2013)
 8 (alterations in original) (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545
 9 U.S. 967, 981 (2005)) (“Unexplained [agency] inconsistency is ... a reason for holding an
 10 interpretation to be an arbitrary and capricious change from agency practice under the
 11 Administrative Procedure Act.”), *abrogated on other grounds by Guerrero v. Whitaker*, 908 F.3d
 12 541 (9th Cir. 2018). Although agencies retain some discretion to disclose records subject to some
 13 of the FOIA exemptions, they have no discretion to disclose records on a legal basis that the
 14 agency concedes is incorrect.

15 Second, Synopsys asserts that disclosure of the records would be arbitrary, capricious, and
 16 contrary to law because disclosure is barred under 18 U.S.C. § 1905. That is the reverse-FOIA
 17 theory prescribed by *Chrysler*, which also concerned EEO-1 data. The government argues that
 18 Synopsys cannot assert § 1905 because “that legal theory appears nowhere in the Complaint.”
 19 *Synopsys Dkt. No. 24*, at 11. This argument is more commonly known as the “theory of the
 20 pleadings” doctrine, but that doctrine has been long been “abolish[ed]” under the Federal Rules.
 21 *Johnson v. City of Shelby*, 574 U.S. 10, 11-12 (2014) (per curiam) (quoting 5 Arthur R. Miller et
 22 al., *Federal Practice and Procedure* § 1219 (3d ed. 2004)); *accord Skinner v. Switzer*, 562 U.S.
 23 521, 530 (2011). Instead, “[s]pecific legal theories need not be pleaded so long as sufficient
 24 factual averments show that the claimant may be entitled to some relief.” *Fontana v. Haskin*, 262
 25 F.3d 871, 877 (9th Cir. 2001); *accord Alvarez v. Hill*, 518 F.3d 1152, 1157-58 (9th Cir. 2008).
 26 Synopsys properly followed the modern fact-pleading approach in this case, alleging the facts
 27 necessary to support its reverse-FOIA claim under the APA. *See generally Synopsys Dkt. No. 1*.
 28 The government has not disputed those allegations and has conceded that the Synopsys

1 information is protected by § 1905. Synopsys has therefore properly presented its reverse-FOIA
 2 claim under the § 1905 theory prescribed by *Chrysler*.³

3 The government’s fallback argument is that this Court’s disclosure order authorizes
 4 disclosure under 18 U.S.C. § 1905. As discussed above, that order is stayed and therefore cannot
 5 provide the legal authorization the government seeks. *See* Part II(B), *supra*. The government’s
 6 related contention that FOIA itself authorizes disclosure under § 1905 is inconsistent with
 7 *Chrysler*, which implicitly rejected such argument and remanded in this very context. Moreover,
 8 the government’s argument begs the question whether Exemption 4 applies. The government
 9 concedes that the Synopsys information is subject to FOIA Exemption 4, so the government
 10 cannot in good faith argue that the same information is “outside the scope of [FOIA’s]
 11 enumerated exceptions.” *Synopsys* Dkt. No. 24, at 13.

12 **D. The Government’s Criticisms Of This Action Are Unwarranted**

13 The government closes by criticizing Synopsys’ approach to this litigation, accusing
 14 Synopsys of making a “mockery” of these proceedings *by following the government’s own*
 15 *roadmap*. *Synopsys* Dkt. No. 24, at 13. *Contra* Brief for the United States, *supra*, at 34
 16 (prescribing Synopsys’ course of conduct here as the proper approach under these circumstances).
 17 But, as explained in the recent reply in support of intervention, the reverse FOIA claims can be
 18 quickly resolved on the merits by adding the cross-claim to the FOIA Action, or by consolidating
 19 this action with the FOIA Action. *See CIR* Dkt. No. 68, at 2-4. Doing so will avoid needless
 20 emergency appeals and stays.

21 To the extent the government believes that intervention by the reverse-FOIA claimant is
 22 the preferred approach because it allows the court to “resolve the FOIA and reverse-FOIA claims
 23 simultaneously,” Brief for the United States, *supra*, at 34, rather than having this separate
 24 Reverse-FOIA Action move forward, Synopsys has no objection to proceeding in that manner if
 25 this Court prefers. By either granting intervention and resolving the reverse-FOIA cross-claims

26 ³ The government’s argument to the contrary is precisely the “punctilious[ness]” the Supreme
 27 Court has rejected. *Johnson*, 574 U.S. at 12. But here, as in *Johnson*, “[f]or clarification and to
 28 ward off further insistence” on a now-defunct legal doctrine, *id.*, Synopsys would be amenable to
 amending its unanswered complaint to add a specific reference to 18 U.S.C. § 1905. *See* Fed. R.
 Civ. P. 15(a).

1 as alleged in Synopsys' proposed pleading, or by consolidating the two related actions, this Court
2 can easily avoid the procedural thicket of potentially conflicting court orders in separate actions
3 and on separate records. The government's protests about complexity ring hollow. Synopsys
4 asks the Court to see this case for what it is: a procedurally proper FOIA/reverse-FOIA case ready
5 for efficient resolution in a single action.

6 Finally, we note that the government is improperly trying to have it both ways here. In the
7 FOIA Action, the government asserted that Synopsys lacks standing, because the government
8 retains discretion to release the records and that "DOL could still disclose the information." *CIR*
9 Dkt. No. 65, at 12. The government distinguished *FMI* because in that case the government had
10 "represented unequivocally" that it would not disclose the records absent a court order directing it
11 to do so. *Id.* at 11 (quoting *FMI*, 139 S. Ct. at 2362). But here the government has now likewise
12 made that unequivocal representation: it will "disclose Synopsys's EEO-1 report *only* because it
13 was ordered to do so by this Court." *Synopsys* Dkt. No. 24, at 1; *accord id.* at 4 ("DOL made the
14 decision to disclose these reports only because it was ordered to do so by the Court."); *id.* at 7
15 ("The agency decided to disclose Synopsys's report only because it was ordered to do so by the
16 Court."); *Synopsys* Dkt. No. 25, ¶ 30 ("DOL decided to disclose Synopsys's report only because
17 it was ordered to do so by the Court."). Moreover, the government lacks discretion given the bar
18 on disclosure imposed by 18 U.S.C. § 1905.

19 The government cannot properly try to box Synopsys out of *both* actions by arguing, on
20 the one hand, that the government retains unfettered discretion and, on the other, that it has no
21 such discretion to exercise (because of a stayed disclosure order). The Court should reject the
22 government's argument, which flies in the face of the principles of justice and fairness that the
23 government's brief purports to laud. Synopsys has a right to have its reverse-FOIA claims heard
24 and adjudicated, and those claims are now ripe for adjudication based on the undisputed factual
25 record, as well as the government's dispositive concessions on all merits issues presented in
26 Synopsys' motion for summary judgment.

27 ///

28 ///

1 **III. CONCLUSION**

2 For the foregoing reasons, Synopsys respectfully requests that the Court grant its motion
3 for summary judgment and deny the government's cross-motion for summary judgment.

4 Dated: March 27, 2020

Respectfully submitted,

7 By: /s/ Denise Mingrone

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